



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: American Cyanamid Company

File: B-232200.2

Date: June 23, 1989

DIGEST

Protest is sustained where evaluation of bids clause in solicitation could reasonably be interpreted to mean that award was to be made on a location by location basis whereas the agency contends that it intended to make award on a line item basis.

DECISION

American Cyanamid Company protests the proposed award of a contract for 38 line items of chemical safety lights to Chemical Device Corporation under invitation for bids (IFB) No. DLA400-88-B-2965, issued by the Defense Logistics Agency. American Cyanamid contends that Chemical Device's bid is nonresponsive because the proposed awardee did not submit bids on all of the line items to be delivered to a particular destination. In the alternative, the protester argues that the IFB evaluation provisions are ambiguous.

Because we agree with the protester that the evaluation provision is unclear, we sustain the protest.

The IFB was issued May 9, 1988, as a partial small business set aside. It requested bids for various estimated quantities of six different types of chemical safety lights, identified by six different national stock numbers for delivery to several locations. Each line item was for an estimated quantity of one type of light which was to be delivered to a single location. Chemical Device was the low bidder for line items 001 through 006 which specified green safety lights, 101.6mm in length, to be delivered to six different locations. It was also the low bidder for line items 0013 through 0020 which specified blue safety lights, 152mm in length, to be delivered to eight locations. The IFB provided for multiple awards. It further stated, in paragraph 4, clause M2, section L that:

"Offers will be evaluated on the basis of the estimated annual requirements for each increment and each level of pack as set forth in the schedule. In order to be considered for an award, offers must offer unit prices for all increments and levels of pack requested for each area or destination bid upon. Only one award will be made for the requirements of each area or destination unless a partial small business or LSA set-aside is involved. If a partial set-aside is involved, the requirement may be acquired through one non-set-aside contract and one set-aside contract."

As an initial matter, the agency urges that we dismiss the protest as untimely since the bid abstract, showing Chemical Device's bid, was available at bid opening on August 23 and American Cyanamid did not protest this matter to the agency until December 23. We find the protest timely.

Although American Cyanamid may have known as of bid opening the grounds for its allegation that award should be made only on a destination basis and that therefore Chemical Device's bid is nonresponsive, it is the agency's acceptance of the alleged nonconforming bid which is the basis of protest. Thus, it is not until the agency determines that Chemical Device is eligible for award and the protester is informed that award has been made that the protester is obligated to file its protest. Sabreliner Corp., B-218033, Mar. 6, 1985, 85-1 CPD ¶ 280. It must of course file its protest within 10 working days of that date to be timely. Bid Protest Regulations, 4 C.F.R. § 21.2(a)(2) (1988). A protester need not file a "defensive" protest where an agency has not made a final determination since a protester may presume that the agency will act properly. Dock Express Contractors, Inc., B-227865.3, Jan. 13, 1988, 88-1 CPD ¶ 23. Here, the protester chose to file an agency-level protest prior to the adverse action.^{1/} It received the agency's denial on March 6 and timely filed its protest with our Office.

American Cyanamid maintains that clause M2 requires that the bidder submit prices for all of the different types of chemical light products which are to be delivered to a single location. It argues that the word "increments" in the clause refers to the specified quantities of the

^{1/} Like a protest filed directly with our Office, an agency-level protest must be timely under our Regulations in order for us to consider a subsequent protest filed with our Office. 4 C.F.R. § 21.2(a)(3).

different types of chemical lights and that "requirements" refers to all of the different types of chemical lights to be delivered to a given location. The protester also points to the third sentence of the clause providing that only one award will be made for the requirements of each area or destination. The protester believes award is to be made on a location by location basis with, at most, two awards per location and that Chemical Device's bid is nonresponsive and should be rejected since the firm did not submit prices for each of the light types required for each location. American Cyanamid argues that either it be given the award as the low responsive bidder for the various locations or that the solicitation be canceled and the requirement resolicited.

The agency disagrees with the protester's interpretation of clause M2 and contends that the solicitation provided for contract award on a line by line basis. According to the agency, 76 separate awards are possible, 2 awards (one to a small business and one to a large business) for each of the 38 line items. As indicated above, each line item represents an estimated quantity of one type of light to be delivered to a single destination. The agency maintains that the word "increments" in clause M2 does not refer to the different quantities specified for each type of chemical light, rather, according to the agency, it refers to incremental bidding. The agency states that incremental bidding requires bidders to submit prices on primary and alternative fixed quantities and was not used in this solicitation. Apparently, the agency used this standard clause, which is to be inserted in solicitations using incremental bidding, in this IFB for the language which explains the award process if a partial small business set aside is involved.

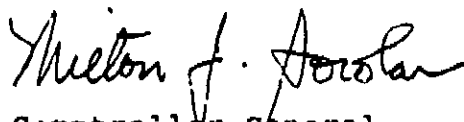
A solicitation must clearly state the basis on which bids will be evaluated for award and the agency's evaluation must conform to the stated method. A to Z Typewriter Co., et al., B-215830.2 et al., Feb. 14, 1985, 85-1 CPD ¶ 198. Where a solicitation does not clearly express the basis upon which bids are to be evaluated and because of this competition is prejudiced, we will recommend that the solicitation be canceled and the requirement resolicited. Id.

We do not think it is reasonable for the protester to construe one type of chemical light to be an "increment" of a different type of chemical light, i.e., that a quantity of 175,000, 101.6-mm green safety lights is an "increment" of 15,000, 152-mm blue safety lights. However, we agree with the protester that there was at least an ambiguity in the

solicitation created by the language in the clause requiring one award for each destination's requirements. In our opinion, one award for a destination's requirements could reasonably mean, as the protester argues, the total requirement for all types of chemical lights to be delivered to a particular location. While the agency insists that it does not wish to make award on the basis of destination, but on a line by line basis, the solicitation did not clearly express that intent. In fact, although in our view most of clause M2 makes no sense at all in the context of this solicitation, it did state that award would be made on an area or destination basis and that was consistent with the bid schedule which called for bids based on type of light and on destination. Since of the five bidders, three bid on all the line items to be delivered to a particular destination, while two, including Chemical Device, did not, we are not able to conclude that this language did not impact on the competition. We sustain the protest for this reason.

In view of the agency's position that it does not wish to make award based on destination, we believe that it would be in the best interest of the government to cancel the solicitation and resolicit the requirement using an invitation clearly advising bidders that award will be made on a line item basis. See Talbott Development Corp., B-220641, Feb. 11, 1986, 86-1 CPD ¶ 152. American Cyanamid is also entitled to the costs of filing and pursuing its protest, including attorneys' fees. 4 C.F.R. § 21.6(d)(1).

The protest is sustained.



Acting Comptroller General
of the United States